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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAR 08 2010

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner claims to be an aerospace manufacturer. It seeks to permanently employ the beneficiary as an aerospace engineer. On the petition, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees.²

The director denied the petition on October 4, 2007, because the labor certification did not require a member of the professions holding an advanced degree. The petitioner appealed the decision on October 29, 2007.

At issue in this case is whether the job offer portion of the labor certification demonstrates that the job requires an individual with an advanced degree. The AAO will also consider whether the petitioner has established that the beneficiary possesses an advanced degree.³

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see*

¹Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

²There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

³An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

also *Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

In order to establish that the offered position qualifies for the requested immigrant classification, "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4). If the offered position does not require an individual with an advanced degree, the petition must be denied.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The key to determining whether the offered position requires an advanced degree is found on the labor certification. See 8 C.F.R. § 204.5(k)(4). The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of ETA Form 9089. In the instant case, the labor certification states that the offered position has the following requirements:

- H.4. Education: Bachelor's degree in engineering design, mechanical engineering or aerospace engineering.
- H.5. Training: None required.
- H.6. Experience in job offered: 60 months.
- H.7. Acceptable alternate field of study: Engineering design, mechanical engineering or aerospace engineering.
- H.8. Acceptable alternate combination of education and experience: Combined education and work experience equivalent to a bachelor's degree, and five years of experience.
- H.9. Foreign educational equivalent acceptable: Yes.
- H.10. Acceptable experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Bachelor's degree or work equivalent in engineering design, mechanical engineering or aerospace engineering required.

⁴The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The labor certification permits an individual to qualify for the offered position with less than a U.S. bachelor's degree. Therefore, the labor certification does not require an individual with an advanced degree as defined by 8 C.F.R. § 204.5(k)(2), and the petition cannot be approved.

Beyond the decision of the director, the petitioner has also failed to establish that the beneficiary holds an advanced degree as required by 8 C.F.R. § 204.5(k)(3).⁵ Since the beneficiary does not possess a master's degree, in order to qualify as a member of the professions holding an advanced degree, the beneficiary must possess a single degree equivalent to a U.S. bachelor's degree in addition to five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree."

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(3)(i)(B).

The record contains the beneficiary's academic credentials and an evaluation of the credentials by [REDACTED] The evaluation states that the beneficiary's education is equivalent to three years of study towards a U.S. bachelor's degree. Therefore, the petitioner has failed to establish that the beneficiary possesses an advanced degree, and the petition cannot be approved for this reason as well.

The record does not establish that the labor certification requires a member of the professions holding an advanced degree. The record also does not establish that the beneficiary possesses an advanced degree. The appeal must therefore be dismissed.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a

⁵The regulation states, in part:

(3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.